From a conversation with a member of your department, I find that you wish to know if a humane officer may be appointed a special constable for the purpose of performing duties as special constable in humane cases.

Section 10,070 G. C. sets out the duties of humane officers. Section 10,072 provides for the salaries of such officers. Section 13,491 provides that a warrant for the violation of the humane laws as tc animals may be issued to such humane agents, and Section 10,070 gives them authority to make arrests for violations of any such laws and for conveying offenders before a proper court.

The Supreme Court of Ohio, in the case of State, ex rel. Ribble, prosecuting attorney, v. Kleinhafer, held that the legislature had failed to provide fees for humane officers.

There is no statutory inhibition against a humane agent acting as constable, or of constable acting as humane agents, nor is one office a check upon the other. There are, however, a number of things each can do legally that the other cannot, though it is physically possible for one person to fill both offices.

Section 13478 G. C. makes it the duty of both constables and humane agents to arrest in cruelty to animals cases, though no such duty is directly imposed on constables in cruelty to persons cases.

Section 3331 G. C. makes provision for the appointment, by justices, of special constables.

If a warrant is issued to such officer in humane cases for offenses as to animals, it could only be issued to him as such officer in view of said section 13491, and there is no other provision for issuing a warrant to him. Section 10,070 gives him authority to arrest offenders against any of the humane laws and to convey such offenders before some court of competent jurisdiction, without a warrant.

I am of the opinion, therefore, that such humane agents, being salaried officers with certain duties to perform, cannot be appointed special constables to perform these same duties.

Respectfully,
C. C. CRABBE,
Attorney-General.

982.

MUNICIPALITIES—COUNCIL OF MUNICIPALITY OWNING AND OPERATING MUNICIPAL WATER, GAS, OR ELECTRIC LIGHT PLANTS, MAY BY ORDINANCE PROVIDE FREE USE WHEN PRODUCTS ARE USED FOR MUNICIPAL OR PUBLIC PURPOSES.

SYLLABUS:

Section 3982-1 *G. C.*, 110 *O. L.*, 126, *permits the council of a municipality owning and opearting water, gas, or electric light plants, by ordinance, at its discretion, to furnish free of charge the products of such plants when said products are to be used for a municipal or a public purpose.*

COLUMBUS, OHIO, December 10, 1923.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date submitting certain questions to this department for answer reads as follows:

"Section 3982-1 G. C., as enacted 110 O. L. 126, provides that:

'The council of any municipality owning and operating municipal water, gas or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes.'

Prior to the enactment of this section there was no authority granted by the legislature to furnish the product of a gas or electric light plant free of charge and free water was limited by section 3963 G. C., as follows:

'No charge shall be made by a city or village, or by the water works department thereof, for supplying water for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of the public school buildings in such city or village.

But in any case where the school district or districts, include territory not within the boundaries of the city or village, a proportionate charge for water service shall be made in the ratio which such tax valuation of the property outside the city or village bears to the tax valuation of all the property within such school district, subject to the rules and regulations of the water works department of the municipality governing, controlling, and regulating the use of water consumed.'

In the case of Euclid v. Camp Wise Association, 102 O. S., 207, this section so far as it required free water to be furnished to charitable institutions, was held unconstitutional.

Question 1: In view of the above authorities does a city have power to furnish free water to a hospital, the property of an association, which renders some free services, and received part of its expenses from the city through taxation?

Question 2: Would it be legal to provide by ordinance for free water and electricity to the McKinley Memorial Building at Niles, Ohio, such building being owned and controlled by a private association and used partially for public purposes?

Question 3: Could council by ordinance authorize free water for a county children's home, located within the corporate limits?"

Section 3982-1 G. C. is not mandatory. Council is permitted to provide water or gas or electricity for municipal or public purposes for which no charge is to be made.

It is to be noted that section 3963 G. C., to which you refer, is mandatory. In *Euclid* v. *Camp Wise*, 102 O. S., 207, to which you also refer, it is held that so far as charitable institutions are concerned section 3963 G. C. violates section 26 of article II of the constitution, being a general law not of uniform operation throughout the state.

All that section 3982-1 G. C. seeks to do is to permit council, at its discretion, to furnish free water, gas, or electricity for a municipal or a public purpose. It may not be demanded of council as a right bestowed by statute upon persons, etc., as is the case under the provisions of section 3963 G. C.

The matter referred to by your first question is for a public purpose, at least in part, since part of the upkeep of the institution named is paid by taxation and a part of the services furnished by the institution is given the public without charge. The McKinley Memorial Building at Niles, Ohio, is a public building designed to accom-

plish a genaral public purpose or service. And the county children's home spoken of in your last question is used and operated solely in furtherance of the public welfare. It seems to me all of these matters spoken of in your questions come within the evident intention of the statute and each of them may or may not be the recipient of the bounty of the municipality dependent entirely upon the action of the council.

In Village of *Perrysburg* v. *Ridgway*, Ohio Law Bulletin and Reporter, issued June 25th, 1923, Case No. 17858, Supreme Court of Ohio, it is held that:

> "The grant of power in section 3 of article XVIII of the constitution is equally to municipalities that do adopt a charter as well as those that do not adopt a charter * * *.',

Section 3 of article XVIII provides:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The exercise of the powers granted in section 3982-1 G. C. seems to be purely a matter coming within all powers of local self-government but if that be not true to give permission for the free service mentioned in said section could not be in conflict with any general law in the nature of a police, sanitary or other similar regulation, since this section by giving such permissive authority avoids any such conflict.

The section under discussion grants council the privilege by ordinance to furnish without charge the service of the plants mentioned which it owns and operates when such service is used, first, for municipal purposes and second, for public purposes.

The distinction between these two uses is not set out in the section nor is either of them defined therein. Council is, therefore, left to exercise its judgment as to what is a use for municipal as well as a use for public purposes. This discretion, when exercised so as not to abuse the spirit or purpose intended or in excess of the scope of the law, it is safe to say, may be disturbed only by modification or repeal by the same or subsequent councils. Each of these uses, however, must be for a public purpose. Use for a municipal purpose is a public use and may be assumed to be one that benefits the inhabitants of the municipality only, while a use for a public purpose, one that will benefit a broader public, such as the county, state or nation, as well as, at the same time, the citizens of the municipality.

Discussion of the term "public use" usually arises in questions coming under the exercise of the power of eminent domain. In *Little Miami Light Co.* v. *White*, 5 O. N. P. (N. S.) 201, the court says:

> "The term 'public use' is generally intended to cover a use affecting the public in general, or any number thereof, as distinguished from particular individuals."

See also:
Giesy v. *R. R. Co.*, 4 O. S., 308;
McQuillan v. *Hatton*, 42 O. S., 202.

In Bouvier's Law Dictionary, public purpose is thus decribed:

> "As employed to denote the objects for which taxes may be levied, it has no relation to the urgency of the public need or to the extent of the public benefit which is to follow. It is on the other hand merely a term of classi-

fication to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest or liberality.'

The term "public use" is also described in *Bouvier* as follows:

"Public use implies the use of many or by the public. It may be limited to the inhabitants of a small or restricted locality, but it must be in common and not for a particular individual."

The effect of the exercise of the power delegated to council by section 3982-1 G. C. is that it allows the council as the legislative body of a corporation, to take the property of the municipality and bestow it elsewhere, upon either a person, corporation or association that renders a service deemed to be of such character as will by its use benefit the municipality or the public generally. The privilege allowed is restricted to councils owning and operating the plants named but the discretion given such councils is quite general.

The McKinley Memorial Building at Niles, about which your second question is asked, may be, and perhaps is, like many such buildings, sometimes, and in part, perhaps, at all times, used for a private purpose or for a function to which a part of the public is excluded. If such be the case, such use is not a public use and free service by the public utilities of the municipality is not proper under this section, although as has hereinbefore been stated, the purpose for which the building was erected is generally a public purpose and for a public use. Your second question is therefore answered in the affirmative only in so far as the service furnished is for a municipal or a public use. The other two questions which you ask are answered in the affirmative.

Respectfully,
C. C. CRABBE,
Attorney-General.

983.

APPROVAL, BONDS OF THOMPSON RURAL SCHOOL DISTRICT, NO. 1, GEAUGA COUNTY, $36,000.00, TO CONSTRUCT AN ADDITION TO THE PRESENT SCHOOL BUILDING.

COLUMBUS, OHIO, December 10, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.